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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 68

R. H. DAVIS, TRADING AS DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

WILLIAM S. KLEINMAN,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

Petitioner was in the automobile sales business in Oak Park, Illinois; respondent was engaged in the finance business in Chicago. During a course of dealings, over a period of two years, the respondent financed the purchase of approximately twenty-eight to thirty-five automobiles for the petitioner (R. 8).

On the purchase of every automobile from the factory, the parties entered into a written agreement of like character as plaintiff's Exhibit 1 (R. 7). This instrument is a combination chattel mortgage and note, bill of sale and trust receipt, the several portions of which were all signed by the petitioner and delivered to the respondent at the time the money for each automobile was paid over to the petitioner. These instruments were not recorded and remained in the possession of respondent until repayment to it by petitioner of the amount of its investment in the respective automobiles, after which the contract would be cancelled and returned to petitioner.

The contract in evidence as Exhibit 1 (R. 7) is dated July 10, 1929, and is a renewal of a like contract executed the previous month. This contract represents an investment of $1,181.87, which sum the respondent paid to the petitioner by a check which is in evidence as Exhibit 2 (R. 7). Petitioner sold the particular automobile described in this contract on August 3, 1929, (R. 8) without the knowledge or consent of respondent. About August 7 or 8, respondent's agent called at petitioner's place of business and discovered that the car had been sold (R. 6), whereupon he made demand upon petitioner for payment of the money due to respondent, as represented by this contract; petitioner replied in effect, that he would send a check as soon as he got around to it (R. 6). The sale of this automobile without respondent's knowledge, having thus been brought to the respondent's attention, and payment of this obligation not having been made for two days after such knowledge was acquired, the respondent immediately thereafter removed from the possession of the petitioner two other automobiles which were then on the show-room floor of petitioner's establishment (R. 7)

under contracts of like character. Within thirty days thereafter, on September 13, 1929, petitioner filed a voluntary petition in bankruptcy (R. 11). In the Bankruptcy Schedules A3 and A4 the respondent is listed as a merchandise creditor to the extent of $50.00, in addition to several items of contingent liability on retail deals which petitioner had endorsed and sold to respondent, with recourse (R. 10). The respondent is not listed in Schedule B3 (R. 17). The petitioner was discharged in bankruptcy on June 9, 1932, whereupon the respondent proceeded with its present action against the petitioner.

The suit as originally filed was in replevin for the recovery of the Auburn Sport Sedan Automobile mentioned in the contract. The car not having been recovered under the Replevin Writ, the respondent declared in trover for the wrongful conversion thereof (R. 1). This change in the form of action is permissible under the Replevin Act of the State of Illinois; the applicable provision is Chapter 119, Sec. 18, Smith-Hurd Illinois Revised Statutes, 1933, which is as follows:

> "When the property or any part thereof has not been found or delivered as aforesaid, and the defendant is summoned or enters his appearance, the plaintiff may declare in trover for such property or so much thereof as is not found and delivered to the Sheriff, Constable, or other officer, and as to the property not found and delivered, the plaintiff, if he shall recover, shall be entitled to judgment for the value thereof or his interest therein, and such damages as he shall have sustained by reason of the wrongful taking and detention, as in other cases of trover."

To the Count in Trover, the petitioner filed two pleas; the first was of the general issue (R. 1), and the second was a special plea alleging the petitioner's adjudica-

tion and subsequent discharge in bankruptcy (R. 2). To the special plea this respondent filed a replication in which it set out the terms of its contract, the wrongful breach thereof and averred that the conduct of the petitioner was such as would place this cause of action within the class of non-dischargeable claims, under Clause 2 and 4 of Sec. 17, of the Bankruptcy Act.

At the conclusion of the trial, and at the request of the petitioner, the Court made a special finding that this petitioner was not actuated by wilful, malicious or criminal intent in disposing of the car in question (R. 3). At the request of this respondent the Court, by a special finding, found the petitioner guilty of legal conversion of the property as described in the Count in Trover (R. 3). By its general finding and judgment, the Court found this petitioner guilty of converting the property of the respondent as charged in the Count in Trover, and assessed the damages at the sum of One Thousand Dollars ($1,000.00) (R. 21).

On appeal to the Appellate Court for the First District of Illinois, that Court after fully reviewing the case said (R. 33):

> "It is apparent from the various agreements made between the parties that the Plaintiff retained all title, dominion, and control over this [illegible] without plaintiff's consent, and that he was guilty of wrongful conversion when he did so."

The Appellate Court likewise held that this respondent's claim against petitioner was not affected by the discharge in Bankruptcy, and affirmed the judgment (R. 33).

SUMMARY OF ARGUMENT.

I.

A claim which is exempt from a discharge in bankruptcy under either of the Clauses of Section 17 of the Bankruptcy Act, may nevertheless be provable without effecting its status as a non-dischargeable claim.

II.

The special findings, insofar as they may be found to be inconsistent to each other, may be entirely disregarded, in which event, the general findings and judgment will control, as sustaining this cause of action. However, giving the special findings their full weight, would not affect the propriety of this judgment, as the Appellate Court of Illinois held that the petitioner's conduct in disposing of the respondent's property, was wrongful.

III.

(a) The sale of the automobile by petitioner in total disregard of respondent's rights under the bailment contract was a wilful and malicious injury to the property of respondent under Clause 2, Sec. 17 of the Bankruptcy Act.

(b) Proof of wrongful intent is not necessary, if the act is wrongful.

IV.

By their contract, the parties created a fiduciary relationship; a breach thereof by petitioner, resulting in injury to this respondent, comes within the exception under Clause 4, Sec. 17 of the Bankruptcy Act.

ARGUMENT.

I.

The contention of petitioner that this claim was provable in bankruptcy has no bearing upon this controversy. A claim which is provable may nevertheless be non-dischargeable. Authority for this rule appears *In re Stark,* 50 Fed. (2nd) 260, where the Court says on page 262:

> "The question whether a claim is provable, however, does not determine whether it is dischargeable, for a defrauded creditor may get on account, what he can in the bankruptcy proceeding by dividends or payment on composition without having barred by the discharge of his debtor any deficiency balance due on his non-dischargeable cause of action for fraud." (Citing *Friend* v. *Talcott,* 228 U. S. 27)

In the present case, the respondent did not file a claim in the bankruptcy proceeding, and received no dividend; it pursued its remedy in trover, after the petitioner's discharge.

The argument on page 10 of petitioner's brief that "The election of respondent to sue petitioner in tort instead of in contract did not change the character of the claim so as to make it not provable in bankruptcy", is inapplicable to the case at bar, as that rule was announced in *Crawford* v. *Burke,* 195 U. S. 176, prior to the amendment of the Bankruptcy Act in 1903. Consequently, the rule no longer prevails. Authority for this statement is found *In re Franks,* 49 Fed. (2nd) 389, which was a case where a judgment in trespass for conversion of an automobile had been obtained against the bankrupt. There was no element of malice

alleged in the pleadings, or mentioned in the judgment. The District Court vacated the order it previously entered restraining the enforcement of the judgment, and said on page 390:

> "Counsel for the bankrupt in support of his contention that the judgment was a provable debt has cited *Crawford* v. *Burke,* 195 U. S. 176 and *Tindle* v. *Birkett,* 205 U. S. 183, and contends that those cases are authority for the proposition that where a plaintiff may waive a tort and sue upon an open account or implied contract, his judgment no matter whether obtained in an action for the tort, or upon the contract or open account, is a provable debt. Both of these cases were based upon Sec. 17 of the Bankruptcy Act prior to its amendment by the Act of February 5, 1903 (32 Stat. 798)."

II.

Counsel for petitioner, in his brief, has argued at great length on the proposition that the Trial Court having made a special finding, at petitioner's request, to the effect that petitioner had not been actuated by a wilful, malicious or criminal intent in disposing of the automobile in question, the conversion was merely technical, and therefore dischargeable. There can be no force to this argument for it ignores entirely the special finding made by the Court at the request of the respondent, "finding the defendant guilty of conversion of the property of the plaintiff as described in the Count in Trover" (R. 3). The Count in Trover charges that the petitioner "wilfully, wrongfully, tortiously and maliciously converted" (R. 1) the automobile which was the subject matter of the suit. Whatever contradiction may appear or exist as the result of the two special findings, is cured by the following lan-

guage of the Court's general finding and judgment (R. 21):

> "Court heard all the evidence adduced and being fully advised in the premises finds the defendant guilty of converting the property of the plaintiff as charged in plaintiff's count in trover heretofore filed herein."

Nor does counsel for the petitioner take cognizance of the fact that the Count in Trover also charges the conversion to have been wrongful and tortious, which was not negatived by either special finding. It is likewise significant that the petitioner entirely ignores the effect of the judgment of the Appellate Court from which we have quoted on page 4, above, and which definitely holds that the conduct of the petitioner in disposing of the automobile of the respondent was improper, and that "he was guilty of wrongful conversion when he did so." This fully conforms to the requirement of the Illinois Statute above quoted. The importance of the elements we have outlined should not have been ignored by the petitioner; a proper presentation of the issues, should have impelled counsel to draw these facts to the attention of this Court.

III (a).

It is obvious that it was the intention of the parties that the respondent should be given the greatest amount of security possible in the protection of its interest in this property against default or misuse thereof by this petitioner. For this reason a composite of a chattel mortgage, trust receipt, and bill of sale was used to create an enforceable contract between the parties. It is to be borne in mind, however, that this instrument was not recorded, and as respects an inno-

cent purchaser of the automobile, it was a secret lien, and unenforceable; although it was enforceable between the immediate parties. In this respect we desire to call the Court's attention to Chapter 121½, Sec. 23, Smith-Hurd, Illinois Revised Statutes, 1933, Page 2559, which provides:

> "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In construing this section of the Statute, the Appellate Court of Illinois, in the case of *Dayton Scale Company* v. *General Market House Company,* 248 Ill. App. 279, (following the language of the Illinois Supreme Court, in the case of *Drain* v. *LaGrange State Bank,* 303 Ill. 330), said on page 283:

> "If a vendor of a chattel delivers it to a vendee or allows him to have possession of the chattel before payment of the purchase price and to have all the *indicia* of ownership, retaining, however, a secret lien for payment, * * * An innocent purchaser will be protected, without regard to the terms of the contract of sale, where the appearance of ownership is in one while the title is really in another, or there is a secret lien."

The following cases reaffirm this rule:

Gilbert v. *National Cash Register Co.,* 176 Ill. 288.

National Bond & Investment Company v. *Shirra,* 255 Ill. App. 415.

Gordon Motor Finance Co. v. *Aetna Acceptance Co.,* 261 Ill. App. 536.

Since the opinion by this Court in *McIntyre* v. *Kavanaugh,* 242 U. S. 138, it is now a definitely settled rule of law, that a claim or judgment for a wrongful conversion of personal property is exempt from the operation of a discharge in bankruptcy. This court said on page 141:

> "To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words. Bouvier's Law Dictionary—Injury. And this we understand is not controverted; but the argument is that an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 amendment will show Congress never intended the words in question to include conversion. We can find no sufficient reason for such a narrow construction. And instead of subserving the fundamental purposes of the statute it would rather tend to bring about unfortunate if not irrational results. Why, for example, should a bankrupt who had stolen a watch escape payment of damages but remain obligated for one maliciously broken? To excuse from discharge the liability arising from such transactions as those involved in *Crawford* v. *Burke,* 195 U. S. 176, and here presented, not improbably was a special purpose of the amendment."

(b).

Counsel for petitioner has gone to considerable length in his argument, to attempt to show that proof of malice or wrongful intent, is a necessary element to exempt a judgment in trover for conversion from a discharge in bankruptcy; in support of this position, counsel cited a number of cases which were actions for fraud and deceit, and for obtaining prop-

erty by false representations. Obviously, in the class of cases mentioned, *scienter* is a primary element, which must be alleged and proved to justify a recovery. The *scienter* forms no part of a trover action for conversion. It is the wrongful act, rather than the intent which establishes this cause of action. The Appellate Court of Illinois, in its opinion in this case restated the rule announced in *Campau* v. *Bemis,* 35 Ill. App. 37, and said (R. 33):

> "A wrongful intent is not an essential element of the conversion. It is enough in this action, that the rightful owner has been deprived of his property by some unauthorized act of another, assuming dominion or control over it."

A number of decisions of the Federal Courts rendered prior and since the amendment of 1903 are reviewed *In re Kalk,* 270 Fed. 627, the Court on page 631 said:

> "But while, to establish malice for certain purposes, such willful intent is not necessary, that intent is not involved in the legal definition of the term 'malice.' Whenever the act is done intentionally, without just cause or excuse, a legal inference of malice arises therefrom."

In re Stenger, 283 Fed. 419, presents an applicable rule. The action was for conversion, but did not charge the bankrupt with wilful or malicious conduct. However, the Court on page 420 said:

> "It is well settled that, in order to come within the 'wilful and malicious injuries' here mentioned, it is not necessary that an injury should involve special or actual malice, but, in the language of the United States Supreme Court in *Tinker* v. *Colwell,* 193 U. S. 473, 'a wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful of itself, and which necessarily causes injury and is

done intentionally, may be said to be done wilfully and maliciously so as to come within the exception' ".

Nowhere does the petitioner contend that he did not intentionally sell this automobile nor does he contend that he did not appropriate the entire proceeds thereof.

The trust receipt portion of this contract has the following provision:

> "I (we) agree not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of any of said property to any other person except upon written order from said corporation or release from trust, upon payment to said corporation of the amount required by said order, and upon the endorsement on the back of this Trust Receipt by said Corporation of a release from Trust."

There are several other provisions in this contract, of like importance, which the petitioner breached by the unauthorized and wrongful sale of this automobile. In view of petitioner's knowledge of the contents of this form of contract, having executed between twenty-eight and thirty-five during his course of dealings with the respondent, his conduct is all the more culpable.

A state of facts analogous to the case at bar was presented *In re Brier,* 3 Fed. (2nd) 709, where the Court in vacating an order entered by the Referee, restraining the enforcement of a claim for conversion, against the bankrupt said:

> "The Far Rockaway Securities Company, Inc., seeks to vacate an order heretofore granted staying that company from prosecuting a suit against the bankrupt upon the ground that, as the suit is in conversion, the claim is not dischargeable. The complaint alleges that a corporation known as Brier Bros., Inc., sold motor vehicles, by instruments in writing to the Far Rockaway Securities Company, the petitioner herein, that these motor

vehicles were left in the possession of the corporation by the Far Rockaway Securities Company, and that defendants (Brier Bros., Inc., Herman Brier, and John M. Brier, individually and as officers of Brier Bros., Inc.) converted the motor vehicles and converted and appropriated the proceeds of sale of said vehicles."

Proceeding further, the court says:

"Under section 17 of the Bankruptcy Act * * * a bankrupt may have a discharge in bankruptcy from all his provable debts, except those which * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another. The claim is made that the nature of the conversion alleged in the complaint is such as to bring the matter within the charge of 'willful and malicious injuries' to personal property.

Whatever confusion existed in reference to the meaning of this clause has been settled by the United States Supreme Court in *McIntyre* v. *Kavanaugh,* 242 U. S. 138, 37 St. Ct. 38, 61 L. Ed. 205. In that case a broker who had sold corporate stocks in excess of the debt for which they had been pledged, as security, and had appropriated the proceeds of sale, without the knowledge or consent of the owner of the stocks, was held to have caused 'willful and malicious injury to the property', within the meaning of clause 2, section 17. * * *"

To the same effect are the decisions in the following cases:

In re Nordlight, 3 Fed. Supp. 486.
In re Franks, 49 Fed. (2nd) 389.
Baker v. *Bryant Fertilizer Co.,* 271 Fed. 473.
In re Stenger, 283 Fed. 419.
In re Keeler, 243 Fed. 770.
Citizens Bank v. *Mullis,* 161 Ga. 371;
Strickland v. *Household Finance Corp.,* 172 Ga. 279.

Probst v. *Jones,* 247 N. W. (Mich.) 779.
South Atlantic Guano Co. v. *Childs,* 101 So. Rep. (Ala.) 445.

IV.

There can be no doubt from an interpretation of the contract between the parties, that it was their intention to create, and they did in fact create a fiduciary relationship. As we have previously pointed out, the unrecorded contract placed this instrument within the category of a secret lien, which was unenforceable against an innocent purchaser for value. It was known to the parties that a sale of this automobile would give the respondent no recourse for the recovery thereof, against an innocent purchaser. It was therefore logical that they should by their written agreement create a relationship which would be indefensible, in the event of a breach by the petitioner. The only logical inference which can be drawn from the use by the parties of a composite of several independent agreements, blended into one contract, is that this respondent sought by its contract to obtain the highest standard of security possible under the circumstances. Under one portion of this contract, this petitioner consented to be bailee of this automobile, while under another portion thereof he became the trustee of this automobile for the benefit of this respondent; in all three portions of the contract he acknowledged this respondent to be the sole and lawful owner of the automobile, and agreed to make no use thereof, except as strictly limited by the contract. To say that the provisions of this agreement do not have the meaning or effect thereby explicitly intended, would be to completely nullify it.

This Court should not be asked to nullify, modify, or remake this contract, merely because the petitioner now finds that bankruptcy will not relieve him from a wrongful breach thereof.

In support of the petitioner's contention that this contract did not create a fiduciary relationship between him and the respondent, and to impress this Court to that effect, counsel for petitioner devoted three pages of their brief to a recital of the case of *Bloomingsdale* v. *Dreher,* 31 F. (2nd) 93. There are many salient features embodied in the contract between the parties to this proceeding, such as the chattel mortgage and bill of sale, which do not appear, and could therefore not have been considered in the case cited. Regardless of this fact, however, the action in that case, was on the debt, evidenced by the contract, and not for damages for the wrongful breach of the contract. The last sentence of the Court's opinion in that case (which counsel did not quote), completely dismisses counsel's argument as to the relevancy of that case, to the case at bar, for the Court said on page 95, in closing:

> "Moreover, the complaint upon which the judgment in the State Court was had sets up the original debt, not a new one arising out of the breach of the trust agreement."

Conclusion.

We respectfully submit that the record is free from the errors urged by the petitioner. The judgment of the Appellate Court for the First District of Illinois is right, is fully sustained by the law, and should be affirmed.

Respectfully submitted,

William S. Kleinman,
Counsel for Respondent.